(18)

No. 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR RESPONDENT

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RULE 29.6 STATEMENT

Respondent's parent corporation is United Parcel Service of America, Inc. Respondent has no non-wholly owned subsidiaries.

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STATEMENT

Factual Background

Petitioner has hypertension that he controls with medication. Pet. App. 2a, 13a. His medical condition has no significant effect on his daily activities; he "functions normally doing everyday activity that an everyday person does." Pet. App. 4a; J.A. 63a, 108a. His only hypertension-related physical restriction is that he should not repetitively lift 200 pounds or more. J.A. 63a, 66a. Petitioner is able to work in a wide range of jobs, and his hypertension does not generally "limit his ability to work or obtain jobs in the open labor market." J.A. 112a, 114a. He has worked as a mechanic for 22 years without experiencing any limitations due to his hypertension, other than his self-imposed habits of using levers to life heavy objects, not running to answer the telephone, and not working over his head. Pet. App. 13a; J.A. 52a.

In August 1994, petitioner applied to respondent United Parcel Service, Inc. ("UPS") for a position as a mechanic in UPS's Manhattan or Topeka, Kansas, facilities. UPS mechanics at those facilities must drive commercial vehicles on a regular basis in order to perform "road tests" (*i.e.*, driving tests of vehicles that have been or need to be repaired) and "road calls" (*i.e.*, driving a vehicle to the location of a broken-down vehicle, fixing the latter vehicle, and driving it back to the facility). Pet. App. 2a, 14a; J.A. 95a-96a. Because UPS tractor-trailer trucks and package "cars" weigh between 12,000 and 55,000 pounds, a valid Department of Transportation ("DOT") health card is required in order to perform road tests and road calls. *Id.*; 49 C.F.R. § 391.41(a). "Meeting DOT requirements is listed as [an] essential function of the job." J.A. 120a.

UPS conditionally hired petitioner as a mechanic, and required him to undergo a physical examination to determine whether he could obtain a valid DOT health card. Petitioner's blood pressure reading in this examination was 186/124, well in excess of the upper limit established by the applicable DOT criteria, which provide that where an indi-

vidual's "[i]nitial blood pressure [is] greater than 180 systolic and/or greater than 104 diastolic," "*[t]he driver may not be qualified, even temporarily*, until his or her blood pressure has been reduced to less than 181/105." J.A. 99a (emphasis in original); *see* C.A. App. 85 (same). The nurse who examined petitioner had never previously examined a UPS mechanic, however, and was unaware that UPS requires its mechanics to drive commercial vehicles. J.A. 74a, 84a, 93a. As a result, the nurse erroneously issued petitioner a DOT health card. *Id.*; J.A. 106a-107a; Pet. App. 16a.

Petitioner worked for UPS on the night shift in its Topeka facility, where his work included performing road calls on tractor-trailer trucks and road tests on package cars. At times during his shift, petitioner was the only mechanic on duty, and was therefore the only mechanic available to perform road tests and road calls. Pet. App. 14a-15a; J.A. 47a.

Shortly after petitioner commenced work, a UPS nurse discovered that petitioner's blood pressure reading exceeded the DOT standard and that his DOT health card had been issued in error. J.A. 84a, 93a; Pet. App. 16a. Petitioner was retested by another medical examiner, but his blood pressure was still in excess of 160/90. *Id.* at 16a-17a. DOT guidelines provide that a driver whose blood pressure is less than 181/105 but greater than 160/90 may, in the discretion of the certifying physician, be given a temporary 3-month DOT certificate to allow time for the driver to reduce his or her blood pressure below 160/90. J.A. 98a-99a. There is no evidence that the examiner who performed petitioner's second examination issued such a temporary certificate.

After learning the results of petitioner's second examination, UPS discharged him because he "did not meet the requirements of the Department of Transportation." J.A. 103a; *see* Pet. App. 5a, 32a; J.A. 85a-88a, 103a-105a.[1] Petitioner

[1] Petitioner errs in contending (Pet. Br. 7) that Monica Sloan, a UPS nurse, "concluded that [petitioner] was not qualified to work

[Footnote continued on next page]

initially sought a waiver of the DOT requirements (J.A. 49a; C.A. App. 109), but ultimately abandoned that request. J.A. 54a. He obtained another job as a mechanic within two to three weeks. Pet. App. 17a.

Proceedings Below

Petitioner commenced this action against UPS in the United States District Court for the District of Kansas under the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, *codified at* 42 U.S.C. §§ 12101 *et seq.* After completion of discovery, the district court granted summary judgment for UPS. Pet. App. 9a-37a. The court held that the plain language of the ADA requires evaluation of the real-world impact of impairments, and that petitioner's medicated hypertension was not a "disability" under the ADA. *Id.* at 22a-32a. The court also concluded that petitioner was not "regarded as" disabled, that petitioner was not "qualified" for the job of UPS mechanic, and that UPS's compliance with DOT regulations provided a complete defense to petitioner's ADA claims. *Id.* at 32a-37a.

The court of appeals affirmed. Pet. App. 1a-6a. Relying on its recent decision in *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, No. 97-1943 (Jan. 8, 1999), the court held that the "disability" determination must "'take into consideration mitigating or corrective measures utilized by the individual.'" Pet. App. 4a. The court noted petitioner's doctor's testimony that "[petitioner] 'functions normally doing everday activity that an everyday

[Footnote continued from previous page]

for UPS because his blood pressure exceeded 140/90 or 140/80." Ms. Sloan testified that UPS "ideally" prefers blood pressure of 140/90 for its drivers (J.A. 88a), but she also made clear that petitioner was required to satisfy only the DOT standard of 160/90 in order to work for UPS. J.A. 85a-87a. And in any event, the record is clear that Ms. Sloan did not make the decision to terminate petitioner's employment. J.A. 84a, 103a.

person does,'" and concluded that his "high blood pressure does not substantially limit a major life activity." *Id.* The court also held that petitioner was not "regarded as" disabled, rejecting his claim that UPS acted for "discriminatory and stereotypical" reasons. *Id.* at 5a. Instead, the court explained, "UPS terminated [petitioner] because his blood pressure exceeded the DOT's requirements." *Id.*

SUMMARY OF ARGUMENT

I. The first prong of the ADA's definition of "disability" asks whether an impairment "substantially limits" the "major life activities" of the impaired individual. 42 U.S.C. § 12102(2)(A). That statutory text requires a functional analysis of the limitations actually imposed on the individual's major life activities, and thus compels consideration of any ameliorative measures or adjustments that in reality serve to limit or control the real-world impact of the impairment. Petitioner's contrary interpretation, which seeks to ignore the actual impact of his impairment in favor of its hypothetical effects, is irreconcilable with the statutory text. Congress mandated an inquiry into whether the impairment "substantially limits" the individual's activities, not whether the impairment "would" or "might" substantially limit those activities in some hypothetical world. Petitioner's attempt to rewrite the unambiguous statutory text should be rejected.

The ADA's structure and design confirm this plain-meaning interpretation of the statute. In its legislative findings, Congress described "individuals with disabilities" as persons whose impairments are "*beyond the[ir] control.*" 42 U.S.C. § 12101(a)(7) (emphasis added). Moreover, by mandating that the prong-one disability determination be made "with respect to an individual" and by reference to the limitations imposed on the "major life activities" of that individual, Congress made clear that the prong-one analysis looks to the real-world limitations actually suffered by the individual. The overall structure of the disability definition further bolsters this conclusion. Unlike prong one of the definition, prongs two and three (which apply to individuals who have a

"record of" or are "regarded as" having a substantially limiting impairment) expressly extend ADA coverage to specified individuals whose impairments are not in reality substantially limiting, demonstrating that Congress knew how to achieve that result when it intended to do so. And Congress's finding that the ADA would protect "43 million" Americans reflects a real-world, functional definition of disability; petitioner's contrary interpretation would yield a far larger population of theoretically "disabled" individuals.

Petitioner's interpretation would also lead to absurd and unworkable results. For example, petitioner's contention that prong one precludes consideration of the effects of medications and other ameliorative measures would necessarily exclude from the disability calculus the *harmful* (as well as beneficial) effects of such measures, even when the treatment for a non-disabling condition itself imposes substantial limitations. Moreover, petitioner's interpretation would impose on employers the impossible burden of attempting to guess whether an individual *would* be substantially limited *if* existing ameliorations were ignored—an inquiry that in many instances would be difficult or impossible to resolve short of litigation, but that the employer would be required to undertake on pain of substantial liability for an incorrect guess. This result cannot be squared with Congress's goal of providing "clear" and "consistent" standards in the ADA. 42 U.S.C. § 12101(b)(1) & (2).

Unlike petitioner's counter-textual reading of prong one, the plain-meaning interpretation is entirely consistent with the design and purpose of the ADA. Far from creating a "Catch-22," as petitioner would have it, the plain-meaning interpretation advances the statutory scheme by extending ADA protection to all those who are truly disabled, while at the same time avoiding creation of a privileged class of specially advantaged, but not substantially limited, individuals. Indeed, it is petitioner's interpretation that would create the strange anomaly of treating individuals with controlled impairments more favorably than their colleagues who are in reality equally or less "able" but who cannot take medication

or otherwise ameliorate their impairments. Moreover, petitioner's interpretation would frustrate the ADA's goals by funneling limited resources away from the truly disabled in order to benefit those whose impairments are not in fact disabling and are not perceived as such. The obligation to "accommodate" the disabled is not absolute, and thus the vast expansion of the class of "disabled" entailed by petitioner's reading of prong one would correspondingly increase the likelihood that accommodations requested by the truly disabled will be deemed an undue hardship.

The pre-ADA understanding of the Rehabilitation Act is consistent with the plain-meaning interpretation of prong one. While the issue of ameliorative measures does not appear to have arisen with much frequency during this time period, pre-ADA cases and agency statements—including a ruling by the EEOC itself—indicate that the Rehabilitation Act was understood to require consideration of ameliorative measures as part of the "handicap" determination.

The legislative history of the ADA does not support petitioner's counter-textual reading of prong one. In the first place, there is no need to consult legislative history, because prong one yields only one plausible interpretation. In any event, the plain-meaning interpretation finds ample support in the legislative history. The Senate Report clearly contemplated that "controlled" impairments would be evaluated in their ameliorated state, and that prong one requires an examination of the restrictions actually imposed on an impaired individual's activities. Petitioner relies on short passages from two of the four House Reports, but those passages are contradicted by other portions of the House Reports, by the Senate Report, and by the statutory text.

Petitioner also relies heavily on the EEOC's interpretive guidance, which purports to preclude consideration of "mitigating measures." Because that guidance is contrary to the plain meaning of prong one, it must be rejected. Moreover, the guidance would not be entitled to deference even if there were some lack of clarity in the statutory text. As a mere interpretive rule, the guidance receives only such judi-

cial consideration as its reasoning merits, but the guidance is internally inconsistent, conflicts with prior and subsequent agency determinations, and makes no effort to address the glaring flaws in its conclusion that "mitigating" measures should be ignored. Accordingly, no deference is due.

II. The third prong of the ADA's definition of disability asks whether the individual is "regarded as" having an impairment that substantially limits major life activities. 42 U.S.C. § 12102(2)(A) & (C). Contrary to petitioner's contentions, UPS did not regard him as substantially limited in the major life activity of working. Rather, UPS discharged him solely because his blood pressure exceeded DOT limits and precluded him from obtaining a valid DOT health card, which was a prerequisite to the job of UPS mechanic. Petitioner points to no evidence that his inability to obtain a UPS health card was perceived as a substantial limitation on his ability to work, and all the available evidence is to the contrary. Indeed, petitioner has worked as a mechanic for 22 years despite his lack of a valid DOT health card, and he obtained another mechanic's job within a few weeks of leaving UPS.

ARGUMENT

I. INDIVIDUAL ADJUSTMENTS AND AMELIORATIONS CANNOT BE IGNORED IN DETERMINING WHETHER AN IMPAIRMENT "SUBSTANTIALLY LIMITS" AN INDIVIDUAL'S ACTIVITIES

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court found it unnecessary to consider the argument that the determination of "disability" status under the ADA should be "assessed without regard to available mitigating measures."

Id. at 2206.[2] This case presents that issue squarely, and UPS submits that the proper resolution is clear: The plain meaning of the statute requires a determination based on the real-world impact of an impairment—including the effects of any ameliorative measures or adjustments actually taken or made by the impaired individual—and does not permit courts or agencies to ignore reality in favor of speculative hypotheses about what impact an impairment could or would have in a different world. That plain-meaning interpretation is consistent with the structure and purpose of the ADA and with the preexisting administrative and judicial interpretation of the relevant statutory language, and is not contradicted by the legislative history of the Act. The counter-textual interpretation advanced by petitioner and the EEOC must be rejected.

A. The Plain Meaning Of The Statutory Text Compels Consideration Of Ameliorating Factors In The "Disability" Analysis

1. The Statutory Text Requires Consideration of Ameliorating Factors

The first prong of the ADA's definition of disability states that "[t]he term 'disability' means, with respect to an individual, . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). On its face, this language clearly contemplates an examination of the extent to which an individual plaintiff's impairment actually constrains his or her ability to engage in major life activities. An individual whose impairment is ameliorated or controlled to such an

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[2] Petitioner nonetheless claims (Pet. Br. 16-17) that *Bragdon* supports his interpretation of the ADA. To the contrary, if *Bragdon* sheds any light on this case, it supports the court of appeals' holding that the disability determination must be made with reference to the actual *results* of an impairment. *See* 118 S. Ct. at 2206 (an impaired individual is disabled if "significant limitations *result from* the impairment") (emphasis added).

extent that it has no substantially limiting effect simply does not have an "impairment that substantially limits . . . major life activities." "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

Petitioner contends, however, that prong one of the definition does not contemplate a real-world inquiry into whether the impairment "currently or actually substantially limits" the impaired individual's major life activities. Pet. Br. 17. Instead, according to petitioner, an impairment's limitations must be analyzed in the abstract, and any ameliorative measures or adjustments that in reality eliminate or control the effects of the impairment must be ignored. Thus, petitioner claims that his hypertension is a disability because "[w]ithout medication he *would* have to be hospitalized, *would* surely incur end organ damage, and [would] eventually die from the high blood pressure." Pet. 7 (emphasis added). Similarly, the Solicitor General argues that petitioner "*is* disabled" because his impairment "*would* substantially limit him in [his] major life activities" but for the fact that it is medically controlled. U.S. Br. 20 (emphasis added). Without doing violence to the statutory text, these hypotheses about what *would* happen if the facts were different than they are cannot suffice to prove that petitioner's impairment "substantially limits" his "major life activities."

Prong one is phrased in the present indicative—an "impairment that substantially limits . . . major life activities"—thereby making clear that the statute looks to the present, real-world limitations actually imposed on the individual's activities as a result of the impairment. An inquiry into the *present* factual impact of an impairment necessarily requires consideration of the real-world effects of any ameliorative measures taken by the individual and any internal physical or mental adjustments that compensate for the impairment.

Petitioner's definition, which looks to whether the individual *would* or *might* be substantially limited in circum-

stances other than those presented in the real world, assumes that Congress intended to use the conditional or subjunctive mood instead of the present indicative form of the verb.[3] But Congress knows how to use the conditional or subjunctive when it means to refer to possible, potential, or counterfactual scenarios rather than focusing exclusively on actual reality—indeed, Congress did precisely that in other, contemporaneously enacted sections of this very Act.[4] In prong one of the disability definition, by contrast, Congress elected not to use the subjunctive or its equivalent, instead adopting only the present indicative form of the verb. That choice has unambiguous significance, and must be given effect. *Cf. United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes").

Petitioner and the Solicitor General effectively ask this Court to rewrite prong one to encompass not only those impairments that do in fact "substantially limit[]" an individual's major life activities, but also those impairments that "might" or "would" be substantially limiting if their effects

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[3] The indicative verb form "represents an attitude toward or concern with a denoted act or state *as an objective fact*." WEBSTER'S THIRD NEW INT'L DICTIONARY 1150 (1976) (emphasis added). The subjunctive mood, by contrast, "represents an attitude toward or concern with a denoted act or state *not as fact* but as something entertained in thought as contingent or possible." *Id.* at 2276 (emphasis added); *see also id.* (defining "subjunctive equivalent" as "a verb phrase formed in English with a modal auxiliary (as *shall*, *should*, *may*, *might*) and functioning in a manner comparable to the subjunctive mood").

[4] *See, e.g.*, 42 U.S.C. § 12147(a) ("alterations ... that affect *or could affect* ... usability") (emphasis added); 42 U.S.C. §§ 12162(e)(2)(B)(i) & 12183(a)(2) (same); 42 U.S.C. § 12112(b)(5)(A) ("would impose"); 42 U.S.C. § 12112(d)(3)(B)(ii) ("might require"); 42 U.S.C. §§ 12142(c)(2)(A) & 12184(c)(1) ("would significantly alter").

had not been ameliorated or controlled.[5] This Court, however, "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 118 S. Ct. 285, 290 (1997). Petitioner and his *amici* point to nothing in the statute's text or structure that would justify a departure from that principle here.

Petitioner's preferred reading of prong one is also inconsistent with the statute's requirement that the disability determination must be made "with respect to [the impaired] individual" and the "major life activities of such individual." This language requires a showing that the impairment has a substantial impact *on the activities of the individual* claiming relief under the Act, not on some hypothetical individual who cannot or does not ameliorate the effects of his or her impairment. Rather than an abstract, hypothetical consideration of the impairment itself, divorced from reality, therefore, the statute contemplates a real-world analysis of the impaired individual and his or her activities, an analysis that necessarily encompasses the extent to which the individual controls or ameliorates the impairment's impact on his or her major life activities. Petitioner engages in his "major life activities" *in the real world*, not in the nonexistent world described by his hypothetical scenarios, and the record is clear that he does not in fact suffer any substantial limitations on his ability to engage in those activities.

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[5] The cases relied upon by petitioner and his *amici* seek to rewrite the statutory text in the same manner. *See, e.g., Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 630 (7th Cir. 1998) (plaintiff "*would* become ill without medication") (emphasis added); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 856, 863, 866 (1st Cir. 1998) (ignoring medication because plaintiff "*would* die in the absence of his insulin injections") (emphasis added); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 523 (11th Cir. 1996) ("in the absence of mitigating measures, [plaintiff's impairment] *would* substantially limit her major life activities") (emphasis added).

In the final analysis, petitioner and his *amici* are unable to come to grips with the fundamental flaw in their proffered interpretation of prong one. The words used by Congress must be given their ordinary meaning. *Smith v. United States*, 508 U.S. 223, 228 (1993). The ordinary meaning of the phrase an "impairment that substantially limits . . . the major life activities of [an] individual" simply does not encompass an impairment that in reality imposes no meaningful limitations on the impaired individual. In petitioner's view, even an individual whose impairment has been permanently and substantially ameliorated by subconscious internal adjustments, surgery, or the like will continue to enjoy the special protections afforded by "disability" status. The "ordinary meaning" of the words used by Congress is directly to the contrary.

2. Structure and Context Confirm the Correctness of the Plain-Meaning Interpretation

The congressional findings set forth in the ADA provide further confirmation, if any were needed, that prong one requires consideration of the real-world impact of controlled impairments. In Section 2(a)(7) of the Act, Congress described "individuals with disabilities" as persons who have suffered from discrimination and limitations "based on characteristics that are *beyond the control* of such individuals . . . ." 42 U.S.C. § 12101(a)(7) (emphasis added). Congress's characterization of disabled individuals as persons whose limitations are "beyond the[ir] control" supports UPS's reading of prong one, and is directly contrary to petitioner's view that prong one extends to impairments that are not truly disabling because they are *within the control* of the impaired individuals.[6]

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6 Petitioner's contrary interpretation would raise serious constitutional difficulties. Congress relied on Section 5 of the Fourteenth Amendment in applying the ADA to the States (*see* 42 U.S.C.

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Further support for this conclusion is provided by Congress's finding that the ADA would protect "43 million" disabled Americans. 42 U.S.C. § 12101(a)(1). This figure appears to have been based at least in part on 1980 census data regarding the number of disabled Americans, adjusted to reflect subsequent population growth and aging. *See* 135 Cong. Rec. 8901 (1989) (statement of Rep. Coelho). Significantly, those census data reflect the number of individuals who *actually* suffered from functional limitations, not those who *would* suffer such limitations if ameliorative measures were disregarded. *See, e.g.*, U.S. Dep't of Commerce, Bureau of the Census, *Disability, Functional Limitation, and Health Insurance Coverage: 1984/85*, Series P-70, No. 8, at 2 (1986) (finding 37.3 million persons with "a functional limitation").

Indeed, these census figures were the product of survey questions that expressly sought information on the limitations actually imposed by *ameliorated* conditions. *See id.* at 47

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§§ 12101(b)(4), 12202), but there is no evidence or congressional finding suggesting that all persons whose controlled impairments are not in reality substantially limiting are members of a "discrete and insular minority" that has been subjected to widespread discriminatory treatment. *See* E. Harris, *Controlled Impairments Under The Americans With Disabilities Act: A Search For The Meaning Of "Disability,"* 73 WASH. L. REV. 575, 594-95 (1998). Extending ADA coverage to all such individuals would raise serious constitutional doubts. *Compare Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 705-08 (4th Cir. 1999) (invalidating ADA regulation as beyond section 5 power, and criticizing Congress's attempt to "redefine" the disabled as a "discrete and insular minority"), *with Coolbaugh v. Louisiana*, 136 F.3d 430, 435-38 (5th Cir.) (upholding ADA because its scope is not disproportionately "sweeping"), *cert. denied*, 119 S. Ct. 58 (1998). The ADA can and should be construed to avoid these doubts about its constitutionality. *See, e.g., Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

("Does [the individual] have difficulty seeing words and letters in ordinary newspaper print *even when wearing glasses or contact lenses* if [he or she] usually wears them?"; "[d]ifficulty hearing . . . *[u]sing a hearing aid*"; "[i]f person uses special aids, ask about the ability to do the activity *while using the special aids*"). Congress's finding of 43 million disabled Americans thus confirms that disability status must be determined based on the real-world impact of impairments, not through a hypothetical inquiry that ignores the effects of individual ameliorative measures. Petitioner's contrary approach would yield a "disabled" population in excess of 100 million, a far cry from the "discrete and insular minority" that Congress sought to protect. *See* Br. *Amici Curiae* of American Trucking Ass'n, *et al.*, at 19-21; Br. *Amicus Curiae* of Society for Human Resource Management at 4-7; *see also* Br. for Respondent United Air Lines, Inc., in No. 97-1943 ("97-1943 UAL Br.") at 10-11, 13, 20-21 (individuals disabled by vision impairments alone would exceed the 43 million figure if ameliorative measures were ignored).

Petitioner contends that the ADA's structure supports his interpretation of prong one. He notes that the second and third prongs of the disability definition include within the category of disabled individuals those persons who do not *actually* have a substantially limiting impairment (and thus do not satisfy prong one) but who instead have a "record of" or are "regarded as" having such an impairment. Pet. Br. 19 (citing 42 U.S.C. § 12102(2)(B) and (C)). The fact that prongs two and three *expressly* extend coverage to certain individuals whose impairments are not in fact substantially limiting, however, hardly supports petitioner's argument that Congress *implicitly* achieved that same result in prong one. To the contrary, it demonstrates that Congress knew how to protect individuals who are not in reality substantially limited when it intended to do so, and that it did not do so in prong one of the definition (where it expressed no such intent).

Equally unpersuasive is petitioner's reliance on the fact that the ADA expressly contemplates consideration of "reasonable accommodations" in determining whether an

individual is "qualified" for employment. Pet. Br. 19-20; *see also* U.S. Br. 13-15. As petitioner correctly concedes, "reasonable accommodations" are, by definition, mitigating measures supplied *by the employer* in response to the needs of a disabled individual. Pet. Br. 19-20; *see* 42 U.S.C. §§ 12111(9), 12112(b)(5)(A). But the fact that Congress required consideration of employer-provided, statutorily mandated measures in determining whether a disabled individual is "qualified" does nothing to demonstrate that the individual's own preexisting efforts to control and minimize the effects of an impairment should be ignored in the disability determination. Rather, the obvious explanation for the reference to reasonable accommodations at this stage of the inquiry is that, in contrast to ameliorative measures undertaken by individuals themselves, reasonable accommodations are supplied by employers *if* an individual has been shown to be disabled. The disability determination must be made "with respect to" *the individual* as he or she functions in the real world, not by reference to whatever mitigating measures a particular employer might provide in the context of a specific job *if* an employee or applicant were found to be disabled. 42 U.S.C. § 12102(2)(A). Thus, petitioner's "structural" arguments are without merit.

3. Petitioner's Interpretation Would Lead to Absurd and Unworkable Results

Petitioner's interpretation would lead to unworkable results that are impossible to reconcile with the manifest purpose and structure of the ADA. For example, petitioner's interpretation would require courts and agencies to ignore the adverse effects of medications or other ameliorative measures in determining whether an individual is disabled. Indeed, the Solicitor General attempts to make a virtue of this fact, trumpeting the purported wisdom of ignoring "the extent to which the medications or devices impose new limitations or uncertainty themselves." U.S. Br. 15. But as one of petitioner's *amici* observes, "for many diseases which are treated with medication . . . the treatment, although potentially lifesaving, can be more disabling than the untreated disease."

Br. *Amicus Curiae* of American Diabetes Ass'n at 12.[7] Under petitioner's reading of prong one, such consequences would have to be ignored, because the effects of medications and other ameliorative measures purportedly cannot be considered in making the disability determination. Pet. Br. 10. Congress cannot possibly have intended to achieve such an absurd result.[8]

In addition, petitioner's interpretation would lead to awkward difficulties and uncertainty in determining whether an individual is disabled. In many instances, the attempt to determine the hypothetical extent of an impairment's limitations in the absence of existing ameliorating measures would depend entirely on highly speculative and undoubtedly conflicting expert medical testimony about abstract possibilities and predictions. Employers and others obligated to comply with the ADA on a day-to-day basis are in no position to determine the hypothetical but nonexistent effects of an employee's controlled impairments. Indeed, to the employer, individuals whose impairments are controlled may not appear to be impaired in any way, let alone "substantially limit[ed]" in any major life activities. As a practical matter, the employer will have no feasible or reliable basis for determining (short of litigation) whether such individuals *would* be substantially limited *if* they ceased their ameliorative measures—yet in petitioner's view, the ADA compels employers to make precisely that impossibly complex and speculative determination on a daily basis.

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[7] *Accord, e.g.*, AMERICAN MEDICAL ASSOCIATION, ESSENTIAL GUIDE TO HYPERTENSION 112-34 (1998) (discussing potentially severe side effects of hypertension medications); R. Irwin *et al.*, *Psychosis following acute alteration of thyroid status*, 31 AUST. N.Z. J. PSYCH. 762, 762-63 (1997) (psychotic reaction to hormone treatments for Grave's disease); *see also* Harris, *supra*, 73 WASH. L. REV. at 599.

[8] Petitioner may attempt to avoid this absurdity by asserting that courts should consider the *harmful* effects of ameliorative measures in making the disability determination, while at the same ignoring the *beneficial* effects of such measures. Needless to say, that internally inconsistent and result-oriented position is equally indefensible. *See* pp. 40-41, *infra*.

To give just one example, osteoporosis is a potentially disabling condition that can be treated with a dietary, vitamin, exercise, and lifestyle regimen that enables individuals to minimize any impairment. D. Cumming & C. Cumming, *Should your patient do with—or without—it?*, 38 CONSULTANT 2417, 2420-26 (1998); P. Taxel, *Osteoporosis: Detection, prevention, and treatment in primary care*, 53 GERIATRICS 22, 37-38 (Aug. 1998). Must an employer whose employee has mild osteoporosis attempt to imagine how much more severe the condition might be if the employee drank less milk and stopped exercising? S. Erickson & T. Sevier, *Osteoporosis in Active Women: Prevention, Diagnosis, and Treatment*, 25 PHYSICIAN & SPORTSMEDICINE 61, 67 (1997). Countless other conditions would entail similarly absurd exercises under petitioner's view of the statute.

This already unworkable burden would be further exacerbated in instances of internal adaptations or "mitigations," where the difficulties inherent in attempting to guess at the extent of hypothetical limitations would be compounded by the absence of any standards for identifying those internal adaptations that can be considered and those that must be ignored. For example, if an individual suffers a stroke that results in blocked brain synapses and a temporary inability to speak, is the individual disabled even after relearning to speak reasonably well, on the ground that the individual's brain has merely "mitigated" the effects of the impairment by developing new neural pathways to bypass damaged areas? *See Brain plasticity brings about stroke recovery*, 20 DIAG. IMAGING, Dec. 1, 1998, at 21; *see also Speech after stroke*, MAYO CLINIC HEALTH LETTER, August 1996, at 1-3. If an individual with dyslexia ultimately develops the ability to read at an above-average level through mental adaptations that mitigate the effects of the impairment, must those adaptations be disregarded for purposes of the disability determi-

nation? *See* J. Rumsey, *The Biology of Development Dyslexia*, 268 J.A.M.A. 912, 913-15 (1992); B. Upbin, *Rose-colored glasses*, FORBES, Dec. 4, 1995, at 294, 295. Petitioner's interpretation of the statute offers no guidance on these and countless similar questions, but employers would be forced to resolve them (on pain of substantial liability for damages and attorney's fees if they guess wrong).

In many such instances, in fact, it will be difficult or impossible to measure the effects of such internal adaptations with accuracy, or even to determine whether they have occurred. By necessitating such speculative and difficult inquiries aimed at permitting courts to disregard the present realities of an individual's circumstances, petitioner's interpretation conflicts with the express purpose of the ADA, which was "to provide a *clear* and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" pursuant to "*clear*" and "*consistent*" standards. 42 U.S.C. § 12101(b)(1) & (2) (emphasis added).

4. The Plain-Meaning Interpretation Comports with the Policy of the ADA

The plain-meaning interpretation of prong one is wholly consistent with the policies expressed in the ADA, and provides full protection to those individuals who in fact suffer from truly disabling conditions (as well as those who have a "record of" or are "regarded as" having such conditions). As noted above, Congress was acting in response to a history of discrimination based on impairments that are "beyond the control of" impaired individuals (42 U.S.C. § 12101(a)(7)); individuals with controlled and ameliorated impairments, by contrast, have not traditionally been subjected to widespread discrimination, precisely because their impairments *are* under control and do not impose substantial limitations. It is telling in this regard that the issue of ameliorating conditions arises most frequently in the context of narrow job categories (such as airline pilots, truck drivers, police, and firefighters) that entail heightened safety concerns. Absent such unique concerns, the vast majority of employers do not make employment decisions on the basis of corrected or ameliorated impairments (such as myopia, high blood pressure, and the like) that impose only insubstantial limitations, if any. And of course, if an employer does discriminate against such individuals on the basis of irrational myths, stereotypes, or misconceptions about their abilities, the "regarded as" prong provides an ADA remedy. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

Petitioner and his *amici* make several attempts to conjure up some sort of tension between the plain meaning of prong one and the overall purpose of the ADA, but their efforts are wholly unsuccessful. For example, they contend that the plain-meaning interpretation creates a "Catch-22" because some individuals with corrected impairments will be excluded from coverage under the ADA even though their impairments render them unqualified for certain kinds of jobs. The fact that the ADA does not protect every impaired individual is neither surprising nor troubling, however, but is instead entirely in keeping with the manifest purpose of the Act. Congress enacted the Americans with *Disabilities* Act, not the Americans with *Impairments* Act, and it expressly limited coverage under prong one to those individuals whose impairments result in "substantial[] limits" on their major life activities. In keeping with that understanding of the Act, the plain-meaning interpretation of prong one extends the protections of the ADA to all individuals who are truly disabled, while avoiding creation of a privileged class of fully "abled" individuals who (by virtue of controlled and non-disabling conditions) would be entitled to special statutory protections and preferences that are denied their unimpaired or slightly impaired colleagues.

Contrary to petitioner's implicit assumption, moreover, the ADA clearly contemplates that individuals whose impairments disqualify them from certain jobs may nonetheless fall outside the scope of the ADA. Consider, for example, an individual who is unable to take hypertension medication and whose blood pressure is consistently above 160/90, resulting in the same minimal limitations as those imposed on peti-

tioner. Despite their identical abilities to engage in "major life activities," petitioner claims that only he, and not this equally limited individual, would be entitled to ADA protection. Similarly, numerous individuals have minor, unameliorated impairments that nonetheless disqualify them from certain types of jobs.[9] Petitioner offers no justification for construing prong one to create a privileged class of protected individuals whose impairments are not in reality disabling, while denying such privileged status to other impaired individuals who are equally or even more limited in their major life activities.

By extending the protections of the ADA to individuals whose impairments are largely or fully ameliorated and are thus not "beyond the[ir] control" (42 U.S.C. § 12101 (a)(7)), petitioner's interpretation would in fact frustrate the ADA's goals by funneling limited resources away from the truly disabled. Under the Act, an employer's obligation to provide "reasonable accommodation" is not unlimited, and ceases at the point that providing such accommodations would constitute an "undue hardship." 42 U.S.C. § 12112(b)(5)(A); *see also* 42 U.S.C. § 12182(b)(2)(A)(iii), (iv) & (v) (similar provisions governing public accommodations). The larger the class of employees entitled to demand "reasonable accommodation," the greater the resulting burden and risk of conflicting demands, with the consequence that accommodations required by the truly disabled will more often be deemed to constitute "undue hardship[s]."[10] Thus, petitioner's interpretation would provide an economic windfall (in the form of an employment preference and the right to demand "accommodation") to an undeserving class of individuals at the expense of the truly disabled. *See* Harris, *supra*, 73 WASH. L. REV. at 584-86, 607-08. As explained in a leading case construing the parallel provision of the Rehabilitation Act, Congress intended to protect only the "truly disabled," and "[i]t would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared." *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986).

It is no response to assert that the ADA should be "broadly" or "liberally" construed in view of its "remedial" purpose. Congress expressed two equally important goals in prong one: Individuals who suffer from substantial limitations on their major life activities by virtue of their impairments should be treated as disabled, and persons who do not suffer from such limitations should not be so treated (unless, of

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9 *See, e.g., Reeves v. Johnson Controls World Servs.*, 140 F.3d 144 (2d Cir. 1998) (agoraphobia); *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (carpal tunnel syndrome); *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (mild hemophilia), *cert. denied*, 519 U.S. 1093 (1997); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1416-20 (10th Cir. 1992) (sensory deficit in two fingers); *see also* cases cited in notes 25 and 27, *infra*.

10 Even individuals whose impairments are under control (and are therefore not substantially limiting) may well be in a position to

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demand (and receive, under petitioner's reading of the ADA) costly accommodations that could potentially conflict with the accommodation needs of truly disabled employees. For example, individuals whose controlled impairments would otherwise disqualify them from a narrow category of jobs by virtue of government safety regulations might demand difficult and contentious restructuring of work and leave schedules, modifications to job duties (at the expense of other, perhaps also "disabled," employees), the hiring of additional employees, or other "accommodations" to their non-disabling conditions. 42 U.S.C. § 12111(9). By vastly increasing the number of individuals protected by the ADA, petitioner's interpretation would dramatically compound the difficulties faced by employers seeking to respond to often conflicting demands for "reasonable accommodation," and would increase the likelihood that employers will find themselves unable (at least without "undue burden") to comply with the accommodation demands of the truly disabled.

course, they have a "record of" or are "regarded as" having such limitations). "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987); *see West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-100 (1991).

Nor is there any substance to the purported concern that denial of ADA protection to individuals with controlled impairments will create an incentive for individuals to cease their ameliorative efforts in order to obtain protection under the Act. It begs credulity (and is insulting to the truly disabled) to suggest that individuals will voluntarily suffer "substantial[] limits" on "major life activities" merely in order to achieve a litigation advantage under federal law. And even if some hypothetical individual were inclined to contemplate such a bizarre course of action, the potential payoff would be far from clear: Failure to ameliorate might make it easier for this hypothetical individual to demonstrate the existence of a disability, but it would make it correspondingly more difficult to prove that the individual is "qualified." *See generally* Harris, *supra*, 73 WASH. L. REV. at 600-01.

Moreover, the parade of horribles described by petitioner's *amici* largely ignores the mechanisms that Congress enacted for preventing discrimination against individuals who actually suffer from, have a record of, or are perceived as having substantially limiting impairments. Thus, for example, the Solicitor General asserts (U.S. Br. 14) that employers would be free to discharge or refuse to hire individuals who must take medication on the job in order to control their impairments. To the contrary, however, individuals who require accommodation to their need for medication in order to work might well satisfy prong one of the disability definition, because their need for such accommodation could render them substantially limited in the major life activity of

working.[11] And employer conduct of this nature could also provide the basis for a claim of "regarded as" disability under prong three of the statutory definition.

The Solicitor General argues (U.S. Br. 15-16) that the plain-meaning interpretation of prong one should be rejected because it would lead to a "strange instability" in the definition of disability. The fact that the effectiveness of some treatments may vary with time, however, is hardly sufficient justification for rejecting a real-world analysis in favor of a speculative inquiry into the hypothetical effects of an impairment based on the false assumption that no ameliorating measures have been taken. Nor does the Solicitor General's preferred reading of the statute avoid the supposedly pernicious result of a "moving target of disability." U.S. Br. 16. The effects of many impairments vary widely over time, but the statute nonetheless requires an individualized assessment of the extent to which those impairments actually result in substantial limitations.[12]

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[11] Indeed, it is petitioner's interpretation of the statute that would lead to anomalous results of this kind, because petitioner construes "disability" to refer exclusively to *unameliorated* impairments and to exclude consideration of medications, treatments, and the like. The ADA prohibits discrimination "because of the *disability*" (42 U.S.C. § 12112(a) (emphasis added)), "by reason of such *disability*" (42 U.S.C. § 12132 (emphasis added)), and "on the basis of *disability*" (42 U.S.C. § 12182(a) (emphasis added)). Under petitioner's interpretation, employers and service providers would be prohibited from discriminating based on an individual's hypothetically unameliorated impairment, but would be free to discriminate on the basis of the individual's real-world ameliorating efforts, because those efforts form no part of petitioner's understanding of the term "disability."

[12] For example, one common form of multiple sclerosis (known as "relapsing-remitting MS") is characterized by periodic attacks followed by partial or total recovery. N. Holland et al., *Multiple Sclerosis: A Guide for the Newly Diagnosed*, at 4 (1996); *accord Secretary, U.S. Dep't of Housing & Urb. Dev. v. Jankowski Lee & As-*

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Petitioner's impairment is a perfect example of this phenomenon. Individuals with hypertension may have widely varying blood pressure readings from time to time. *See* G. Parati *et al.*, *Clinical relevance of blood pressure variability*, 16 J. HYPERTENSION S25, S25 (Supp. 1998). Far from creating "strange instability," medication can actually *reduce* the variability of hypertension and other impairments. *See* J. Minami *et al.*, *Comparison of 24-hour Blood Pressure, Heart Rate, and Autonomic Nerve Activity in Hypertensive Patients Treated With Cilnidipine or Nifedipine Retard*, 32 J. CARDIOVASCULAR PHARMACOLOGY 331, 331-36 (1998); J. Walsh, *Psychopharmacological treatment of bipolar disorder*, 8 RESEARCH ON SOC. WORK PRAC. 406, 409-10 (1998) (medication can moderate mood swings caused by manic depression). And of course, if the effects of an individual's impairment and ameliorating measures are sufficiently variable that the individual's ability to work or engage in other major life activities is substantially limited, that individual is disabled within the meaning of prong one.[13]

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socs., 1995 WL 399384, at *1-2 (EEOC June 30, 1995). Numerous other impairments, such as bipolar disorder (*see* A. Frances *et al.*, *The Expert Consensus Guidelines for Treating Depression in Bipolar Disorder*, 59 J. CLINICAL PSYCH. 73, 74 (Supp. 4 1998)) and arthritis (*see* A. Silman, *Problems Complicating the Genetic Epidemiology of Rheumatoid Arthritis*, 24 J. RHEUMATOLOGY 194, 194-96 (1997)), also fluctuate widely in severity over time. *See also* 63 Fed. Reg. 57190, 57192 (1998) ("Disability is a contextual variable, dynamic over time and circumstance.").

[13] Various arguments advanced by petitioner and his *amici* proceed from the assumption that the plain-meaning interpretation would preclude all persons with controlled impairments from satisfying the requirements of prong one. *See, e.g.*, Br. of *Amici* AIDS Action *et al.* at 21-23 (arguing that plain-meaning interpretation should be rejected because treatments do not necessarily eliminate all substantially limiting effects). That assumption is incorrect. Individuals whose ameliorated impairments still result in substantial

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B. The Historical Understanding Of The Rehabilitation Act Confirms The Correctness Of The Plain-Meaning Interpretation

As this Court observed in *Bragdon v. Abbott*, "[t]he ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973 . . . ." 118 S. Ct. at 2202. Accordingly, the administrative and judicial interpretations of the Rehabilitation Act provide guidance in interpreting the ADA's definition of disability. *Id.* at 2208; *see also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). In this case, those sources provide additional support for the plain-meaning interpretation of prong one.

1. Judicial Interpretations of the Rehabilitation Act Prior to the ADA

The few pre-ADA cases that actually addressed this issue under the Rehabilitation Act took the effects of ameliorative measures into account in determining whether a plaintiff was "handicapped." For example, in *Trembczynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987), the court rejected a Rehabilitation Act claim brought by individuals who were barred from employment as full-time police officers because of their vision impairments. The court held that "Plaintiffs have failed to allege they are 'individuals with handicaps,'" because "[t]hey allege their vision is correctable to 20/20." *Id.* at *5. The court relied on and quoted with approval from an earlier Rehabilitation Act decision that applied the same reasoning. *Id.* at *4 (quoting *Padilla v. City of Topeka*, 708 P.2d 543, 550 (Kan. 1985)). The *Padilla* court had rejected a virtually identical claim, explaining:

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limitations (either because the impairment is not fully treatable or because the amelioration itself results in substantial limitations) are disabled under the plain meaning of prong one.

> *With corrective lenses*, plaintiff's vision is 20/20. Plaintiff has *worn glasses* since his grade school days and testified to no problems or limitations in his activities. . . . Plaintiff has a visual impairment, but he has failed to meet the threshold requirement that he [be] a handicapped person [under the Rehabilitation Act].

708 P.2d at 550 (emphasis added). *See also Chandler v. City of Dallas*, 2 F.3d 1385, 1390 & n.16 (5th Cir. 1993) (citing *Collier v. City of Dallas*, No. 86-1010 (5th Cir. Aug. 19, 1986), for the proposition that "[t]his court has previously held that a person is not handicapped if his vision can be corrected to 20/200").

A number of other pre-ADA cases reflect judicial consideration of ameliorative measures as part of the "handicapped" determination, although in these cases the plaintiffs were found to be handicapped even in their ameliorated states. Thus, for example, in *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), the court held that the plaintiff's "epilepsy substantially limits her ability to work" because "*[e]ven though medication controls her seizures*, federal and state regulations and policies restrict the types of jobs available to her." *Id.* at 574 (emphasis added). *Accord Pineiro v. Lehman*, 653 F. Supp. 483, 490 (D.P.R. 1987) (plaintiff with epilepsy-like condition was handicapped because "he suffered a fourth seizure . . . *while taking medication* (Dilantin) intermittently for the previous two years") (emphasis added).

Despite this line of authority, petitioner's *amici* contend that the judicial construction of the Rehabilitation Act actually supports their interpretation of the ADA. The Solicitor General relies (U.S. Br. 12 n.5) on *Reynolds v. Brock*, *supra*, but as discussed above, the *Reynolds* court quite clearly evaluated the plaintiff *in her medicated state* (*see* 815 F.2d at 574), an approach that is directly at odds with the theory advanced by petitioner and his *amici*. The Solicitor General also cites *Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983), and *Longoria v. Harris*, 554 F. Supp. 102 (S.D. Tex. 1982), but in both of those cases there was no dispute over the "handicapped" issue and thus the courts had no

occasion to, and did not, address it. *See* 716 F.2d at 230 (handicap issue "undisputed"); 554 F. Supp. at 102-03 (parties "stipulated to the facts," including that plaintiff "had his right leg amputated below the knee cap in 1969 and therefore is a handicapped individual"). The cases cited by petitioner's other *amici* suffer similar flaws. Many are completely irrelevant because they were decided after enactment of the ADA in July 1990 and thus shed no light on Congress's understanding of the language incorporated into the ADA. Several of the remaining cases actually take ameliorative measures into account,[14] and the others either do not address the significance of ameliorative measures at all,[15] or involve stipulations or admissions of handicapped status and thus do not decide the question at issue here.[16] Accordingly, the pre-ADA judicial construction of the Rehabilitation Act reveals that courts considered the effects of ameliorative measures in assessing whether an individual was "handicapped" under that Act.

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14 *See, e.g., Davis v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988) (finding plaintiff handicapped as "*[a]n insulin-dependent* diabetic") (emphasis added), *aff'd*, 865 F.2d 592 (3d Cir. 1989); *Akers v. Bolton*, 531 F. Supp. 300, 304 (D. Kan. 1981) (finding that epilepsy medications "are another likely component in the link between epilepsy and school problems").

15 *See, e.g., Kohl v. Woodhaven Learning Ctr.*, 865 F.2d 930, 935 (8th Cir. 1989); *Mantolete v. Bolger*, 767 F.2d 1416, 1420, 1421-24 (9th Cir. 1985); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

16 *See, e.g., Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) ("[i]t is not disputed that . . . [plaintiff] is a 'handicapped person' under the Act"); *Sharon v. Larson*, 650 F. Supp. 1396, 1401, 1402 (E.D. Pa. 1986) ("[i]t is not disputed that [plaintiff] is handicapped").

2. Administrative Interpretations of the Rehabilitation Act Prior to the ADA

In a surprising omission from his brief, the Solicitor General fails to inform the Court that, prior to the adoption of the ADA, the EEOC itself interpreted the Rehabilitation Act to require evaluation of individuals *in their ameliorated state* for purposes of the "handicapped" determination.[17] In *Kienast v. Frank*, No. 05900123, 1990 WL 711359 (EEOC Mar. 27, 1990), the EEOC rejected a claim under the Rehabilitation Act precisely because the individual had ameliorated the effects of her impairment and was therefore not handicapped:

> In the present case, it is undisputed that appellant has a vision impairment which requires her to wear corrective lenses. Appellant does not claim that her vision problems were not *fully corrected by wearing the lenses. Consequently, we find that appellant was not substantially limited* in any of her major life activities and, therefore, she was not handicapped . . . .

1990 WL at *6 (emphasis added). This pre-ADA interpretation confirms the need to consider ameliorative measures as part of the prong-one inquiry.

The regulations issued under the Rehabilitation Act do not specifically discuss ameliorative measures. They do, however, provide support for the conclusion that the determination whether an individual's impairment is "substantially

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17 Indeed, it appears that the United States has continued to maintain this position after the enactment of the ADA. *See, e.g., Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (IRS argued that "plaintiff is not entitled to the protection of the Rehabilitation Act . . . because her condition is so easily correctable"); *Liff v. Secretary of Transp.*, 1994 WL 579912 at *3 (D.D.C. Sept. 22, 1994) (defendant argued that "because plaintiff's depression is generally controlled by medication, her impairment does not substantially limit any of her major life activities"), *adopted*, 1995 WL 231246 (D.D.C. Feb. 21, 1995).

limit[ing]" is to be made by reference to the real-world impact of the impairment, not by consideration of a hypothetical and counter-factual scenario that ignores the effects of ameliorative measures. For example, in issuing its final rule implementing Section 504 of the Rehabilitation Act, the Department of Health, Education and Welfare ("HEW") "emphasized that a physical or mental impairment does not constitute a handicap" unless it "*results in* a substantial limitation of one or more major life activities." 42 Fed. Reg. 22676, 22685 (1977) (emphasis added); *see* 45 C.F.R. Pt. 84 App. A, subpart A, Definitions, ¶ 3 (1990). HEW's recognition that what matters are the *results* of the impairment is inconsistent with petitioner's interpretation, which ignores results and instead looks to theoretical possibilities that are admittedly *not* the true results of the impairment.

Similarly, the Department of Labor, which is charged with implementing Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, issued a new substantive regulation implementing Section 503 on April 16, 1976, shortly after the Rehabilitation Act had been amended to include the present definition of handicapped individual. *See* 41 Fed. Reg. 16147 (1976). This regulation states that "a handicapped individual is 'substantially limited' if he or she *is likely to experience difficulty* in securing, retaining or advancing in employment because of a handicap." 41 Fed. Reg. 16149 (emphasis added); *see* 29 C.F.R. § 60-741.2. The Department's regulations implementing Section 504 of the Rehabilitation Act are to the same effect, and also provide that "'[s]ubstantially limits' means the degree that the impairment *affects* an individual . . . or *affects an individual's employability*." 45 Fed. Reg. 66706, 66710 (1980) (emphasis added). By emphasizing the plaintiff's need to show real-world *effects* resulting from the impairment, these regulations are necessarily inconsistent with the view that the real-world impact of ameliorative measures must be ignored. Accordingly, these contemporaneous regulatory interpretations of the Rehabilitation Act are consistent with the EEOC's pre-ADA decision to consider ameliorative measures in determining whether an individual

is "handicapped," and provide additional support for adhering to the same approach under the ADA.

C. The ADA's Legislative History Does Not Support Petitioner's Interpretation Of Prong One

Petitioner attempts to bolster his counter-textual reading of prong one by reference to the legislative history of the ADA. As this Court has repeatedly held, however, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989). The plain meaning and structure of the ADA preclude petitioner's attempt to substitute a hypothetical inquiry for the real-world analysis mandated by the statute, and accordingly there is no cause to consider legislative history in this case.

Even if the Court were to examine the legislative history, moreover, it would find no basis for discarding the plain-meaning interpretation in favor of petitioner's wholly implausible reading. Indeed, the Report submitted by the Senate Committee on Labor and Human Resources is wholly consistent with the plain-meaning interpretation of prong one, and is irreconcilable with petitioner's counter-textual reading of the ADA.

The Senate Report is laced with statements confirming that the prong-one definition focuses on the real-world effects, impacts, and results caused by an individual's impairment. For example, the Report describes individuals with disabilities as persons whose impairments "are *beyond the control* of such individuals," and makes clear that an impairment "does not constitute a disability under the first prong of the definition . . . unless its severity is such that it *results in* a 'substantial limitation of one or more major life activities.'" S. Rep. No. 101-116 at 15, 22 (1989) (emphasis added). Similarly, the Report emphasizes the need to examine the actual present restrictions felt by an impaired individual in making the disability determination: "A person is considered an individual with a disability for purposes of the first prong of the definition *when the individual's important life activi-*

ties are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." *Id.* at 23 (emphasis added). When the effects of an individual's impairment are eliminated through medication, diet, or subconscious adjustments, it simply cannot be said that the individual's "important life activities *are restricted*" in any meaningful sense.

Most saliently, the Senate Report expressly addresses the subject of controlled impairments in discussing the third, "regarded as" prong of the disability definition:

> An[] important goal of the third prong of the definition is to ensure that persons with medical conditions that are *under control*, and that *therefore* do not *currently* limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

Id. at 24 (emphasis added). This passage clearly confirms that impairments are to be evaluated in their ameliorated or controlled state in determining whether they "currently limit major life activities," *i.e.*, in making the determination of actual disability under prong one. And importantly, the definitional language of the bill discussed in the Senate Report is identical in all respects to the definition ultimately adopted by Congress. *Compare* 42 U.S.C. § 12102(2) *with* S. 933, 101st Cong. § 3(2) (Aug. 30, 1989).

Petitioner attempts to downplay the significance of this passage, arguing that it is merely a reference to mild impairments that are not substantially limiting "even if the evaluation is made without considering mitigating measures." Pet. Br. 24. Petitioner's argument is unavailing. The Report plainly contemplates that prong one does not extend to impairments that are "under control" to such an extent that they do not "*currently* limit major life activities." Accordingly, the Report reflects clear disagreement with petitioner's argument that the ameliorative effects of measures taken to

control an impairment must be disregarded in performing the prong-one analysis.

Petitioner points to the Senate Report's statement that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116, *supra*, at 23. That language, however, will not bear the weight placed on it by petitioner. In the first place, the mere "*availability*" of mitigating measures *is* irrelevant to the disability determination under prong one. The statutory text requires an examination of the impaired individual as he or she is in the real world, not a speculative inquiry into what limitations *might* exist if "availab[le]," but unused, "mitigating" measures were to be taken.

Moreover, when read in context, the reference to "mitigating measures" was clearly not intended to preclude consideration of ameliorative actions actually taken by impaired individuals themselves in order to control their impairments. The Report refers only to "mitigating" measures "*such as reasonable accommodations or auxiliary aids.*" Those phrases are terms of art under the ADA, and refer exclusively to measures that could or must be taken by *employers* or other entities subject to the Act in order to permit an impaired individual to satisfy applicable qualification standards. *See* 42 U.S.C. §§ 12102(1), 12111(9), 12112(b)(5)(A), 12131(2), 12182(b)(2)(A)(iii); *see also id.* § 12182(b)(2)(A)(ii). Indeed, the Report emphasizes that ameliorating measures taken by impaired individuals themselves are *not* within the purview of "reasonable accommodation." S. Rep. No. 101-116, *supra*, at 33 ("The Committee wishes to make it clear that non job-related personal use items such as hearing aids and eyeglasses are not included in this [reasonable accommodation] provision."). Thus, the Report's reference to measures "such as reasonable accommodations or auxiliary aids" merely makes clear that the determination whether an impaired individual is "substantially limit[ed]" is to be made without consideration of any measures that could or would be taken by employers or other covered entities *after* it has been

determined that an individual is disabled. The disability determination is instead to be made with reference to current reality, precisely as the courts below held.

Petitioner also relies heavily on short passages in two of the four House Reports suggesting that persons with substantially limiting impairments may be disabled "even if the effects of the impairment are controlled by medication" or, in the case of a hearing impairment, "even though the loss may be corrected through the use of a hearing aid." H. Rep. No. 101-485(II) at 52 (1990); *see also* H. Rep. No. 101-485(III) at 28-29 (1990) (containing a garbled and ambiguous discussion of this issue).[18] Those stray passages offer no explanation for the failure to adopt language to that effect in the statute itself, however, and they are inconsistent with other statements in the House Reports. *See, e.g.*, H. Rep. No. 101-485(II) at 52 (impairment not disabling unless "it *results* in a 'substantial limitation of one or more major life activities,'" which occurs "*when* the individual's important life activities *are* restricted") (emphasis added); H. Rep. No. 101-485(IV) at 36 ("These three prongs of the definition are intended to have the same meanings given to the corresponding provisions used in the definitions of the term 'individual with handicaps' in . . . the Rehabilitation Act . . . ."). And of course, these passages also conflict with the Senate Report (as well as with the text of the ADA itself). Accordingly, petitioner's attempt to avoid the plain-meaning interpretation of prong one must be rejected.

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[18] Language to this effect does not appear in either the other two House Reports or in the final House Conference Report. *See* H. Rep. No. 101-485(I) (1990); H. Rep. No. 101-485(IV) at 36 (1990) (section-by-section analysis discussing definition of "disability" without purporting to exclude consideration of "mitigating measures"); H. Conf. Rep. No. 101-596 (1990).

D. The EEOC's Interpretation Is Not Entitled To Deference

Petitioner relies heavily on an "Interpretive Guidance" issued by the EEOC, which states that "[t]he determination of whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j), at 348 (1998); *see also* 28 C.F.R. Pt. 35 App. A § 35.104; 28 C.F.R. Pt. 36 App. B § 36.104. Petitioner's reliance is misplaced, for several reasons.

First, an agency interpretation, no matter how authoritative, cannot override the plain meaning of a statute enacted by Congress. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions" that are determined to be "contrary to clear congressional intent" after applying "traditional tools of statutory construction." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 & n.9 (1984). In this case, "the text and reasonable inferences from it give a clear answer against the Government, and that . . . is the end of the matter." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (internal punctuation omitted).

Moreover, petitioner and his *amici* err in contending that *Chevron* establishes the appropriate framework for evaluating the agency materials at issue here. The EEOC statement relied upon by petitioner is not set forth in a substantive regulation having the force of law; rather, it is contained in an interpretive guidance that lacks binding effect and to which *Chevron* does not apply. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court declined to defer to an EEOC interpretation of this type, explaining that "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability." *Id.* at 141-42; *accord EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (holding that *General Electric Co. v. Gilbert* establishes "the proper deference to be

afforded the EEOC's guidelines"); *see also Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Batterton v. Francis*, 432 U.S. 416, 424-25 & n.8 (1977); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); K. Davis & R. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, §§ 3.5, 6.3 at 236 (3d ed. 1994) ("the *Chevron* test does not apply to interpretative rules").

Petitioner and the Solicitor General argue that the interpretive guidance at issue here should be given heightened deference because it was purportedly issued pursuant to formal notice and comment procedures at the same time as the EEOC's regulations. But that argument is simply wrong, for several reasons. First, the interpretive guidance was not in fact "subject to the same notice and comment as the regulations." U.S. Br. 19. The EEOC's notice of proposed rulemaking invited public comment on the agency's proposed "substantive regulations," which were to be issued pursuant to the mandate of the ADA. 56 Fed. Reg. 8578 (1991). The notice then went on to observe that the EEOC was "also issuing interpretive guidance," and invited comments only as to a *specific portion* of that guidance—the definition of "regarded as" disability—and *not* as to the discussion of prong one. *Id.*[19] And the language upon which petitioner places principal reliance was not even contained in the version of the guidance published with the notice, but was instead added after the comment period had closed. *See* 97-1943 UAL Br. at 24-25.

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[19] The preamble to the EEOC's final rule confirms that the EEOC "solicited and considered public comment *in the development of part 1630*" (56 Fed. Reg. 35726 (1991) (emphasis added)) whereas the interpretive guidance was recognized to be separate and distinct from "part 1630." *Id.* ("The Commission is also issuing interpretive guidance *concurrently with* the issuance of *part 1630* .... Therefore, part 1630 is *accompanied by* an appendix.") (emphasis added).

Regardless of the procedures attendant upon its issuance, moreover, it is undisputed that the interpretive guidance (like the other agency materials cited by petitioner) is nothing more than a non-binding interpretive statement rather than a formal, legally binding, substantive rule issued pursuant to express statutory authority. Indeed, the EEOC itself repeatedly emphasized that fact, taking great pains to distinguish between the "substantive regulations implementing title I" that were contained in part 1630 itself, and the "interpretive guidance" that "represents the Commission's interpretation of the issues discussed" and was set forth in a separate "appendix." 56 Fed. Reg. 35726 (1991). As this Court has explained, the crucial distinction between binding substantive rules and non-binding interpretive statements is that the former are issued pursuant to express statutory authority to "'implement' the statute" and "'have the force and effect of law,'" whereas the latter "are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)); *see Shalala v. Guernsey Mem. Hosp.*, 514 U.S. at 99; *Batterton*, 432 U.S. at 425 n.8; *see also* Davis, *supra*, § 6.3. The EEOC's guidance falls in the latter category.

Petitioner and the Solicitor General nonetheless seek heightened deference here, relying on cases deferring to agencies' interpretations of their own regulations. Pet. Br. 28-29; U.S. Br. 18. That rule of deference is inapposite, however, because in those cases the agency's regulation, rather than the statute itself, supplied the governing standard or rule of decision. *See, e.g., Martin v. OSHRC*, 499 U.S. N.D. 144, 148 (1991); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to agency interpretation "[b]ecause the salary-basis test is a creature of the Secretary's own regulations"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Here, by contrast, it is the statute, not the regulation, that supplies the rule of decision, and thus no special deference is due to an interpretive guidance that purports to redefine the statutory text.

The cases relied upon by petitioner are also inapposite for another reason: They each involved regulations promulgated pursuant to express statutory authority. *Auer*, 519 U.S. at 456; *Thomas Jefferson Univ.*, 512 U.S. at 506-08; *Martin*, 499 U.S. at 147-48. Here, by contrast, Congress plainly did *not* grant the EEOC express authority to define "disability" or "substantially limits." Congress granted the EEOC authority to issue substantive regulations "to carry out Title I" of the ADA, but the statutory definition of "disability" *is not contained within* Title I. *See* ADA § 3(2), 104 Stat. 329, *codified at* 42 U.S.C. § 12102(2); ADA tit. I, § 106, 104 Stat. 336, *codified at* 42 U.S.C. § 12116. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress" (*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)), and no such authority was delegated in this instance. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465 n.12 (1989); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

Indeed, Congress exercised great care in allocating substantive rulemaking authority over specified portions of the ADA to particular agencies. *See, e.g.*, 42 U.S.C. §§ 12134(a), 12143(b), 12149(a), 12164, 12186(a)(1), 12186 (a)(2)(A)(i), 12186(a)(2)(B)(ii), 12186(b), 12204; 47 U.S.C. § 225(d). Its refusal to delegate such authority over the definition of "disability" should be respected, particularly because the only alternative is to infer a congressional delegation of overlapping rulemaking authority to each of the multiple agencies authorized to implement various portions of the ADA, an approach that would render *Chevron* deference inappropriate in any event (*see Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (opinion of Stevens, J.)) and could give rise to conflicting regulations.[20]

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[20] In *Bragdon*, after having already concluded that respondent was disabled under the ADA (118 S. Ct. at 2207), this Court commented in *dictum* that the Department of Justice's views regarding

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Thus, the non-binding EEOC pronouncements relied upon by petitioner are not entitled to controlling weight. Even if there were some doubt about the plain meaning of prong one, therefore—which there is not, for all the reasons discussed above—"'the level of deference afforded [to the EEOC's guidance] w[ould] depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Arabian American Oil Co.*, 499 U.S. at 257. "The EEOC's interpretation does not fare well under these standards." *Id.*

Far from reflecting thorough consideration, the portion of the interpretive guidance relied upon by petitioner fails to acknowledge, much less address, the glaring inconsistency between the text of prong one and the conclusion expressed in the guidance. The guidance instead purports to base its conclusion regarding "mitigating measures" solely on the ADA's legislative history, but it wholly ignores substantial countervailing evidence in the various Committee Reports and in the pre-ADA construction of the Rehabilitation Act. *See* pp. 25-33, *supra*. And the guidance is internally inconsistent in several respects. For example, after stating that medicines and other measures to control impairments must be disregarded, the guidance posits the example of an indi-

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Title III of the ADA "are entitled to deference." *Id.* at 2209 (citing *Chevron*). The Court's *dictum* did not specifically discuss the degrees of deference due to the various types of agency materials regarding the ADA, and did not discuss the facts that no agency possesses substantive rulemaking authority with respect to the definition of disability and that any implied ability to issue interpretive rules is shared among multiple agencies. *Cf. id.* at 2207 (declining to resolve degree of deference due to multiple agencies under Rehabilitation Act). Accordingly, this *dictum* cannot be read to compel *Chevron* deference with respect to the agency materials at issue here.

vidual who "has *controlled* high blood pressure *that is not substantially limiting*." 29 C.F.R. Pt. 1630 App. § 1630.2(l) (emphasis added). Moreover, the guidance states that prong one measures the "impact [on] *an individual's life*" and the "effect of that impairment *on the life of the individual*" (*id.*, § 1630.2(j))—a mode of analysis that is irreconcilable with an approach that ignores the impairment's true "effect . . . on the life of the individual" in favor of a hypothetical inquiry.

In addition, the EEOC's interpretive guidance is contradicted by the agency's purportedly binding regulation on the same subject. The regulation defines "substantially limits" to mean "[s]ignificantly restricted as to the condition, manner or duration under which an individual *can perform* a particular major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). By focusing exclusively on the extent to which an impaired individual "can perform" major life activities, the regulation necessarily requires a functional analysis and precludes a hypothetical inquiry conducted without reference to the individual's actual abilities.

The EEOC's guidance also conflicts with earlier and later pronouncements of the agency. As noted above (at p. 28), the EEOC has construed the Rehabilitation Act to require consideration of ameliorative measures in determining whether an individual is "substantially limit[ed]," yet the ADA guidance takes the opposite approach—without offering any explanation for the change. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (inconsistent agency positions receive "considerably less deference") (citations and internal punctuation omitted). And EEOC publications issued since announcement of the guidance also contain a variety of conflicting statements.[21]

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[21] *See, e.g.*, EEOC, A Technical Assistance Manual on Title I of the ADA, § 2.2(c)(1) (1992) ("The individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: An employee has *con-*

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Moreover, the EEOC apparently disagrees with the Solicitor General on at least one aspect of this issue. As noted above, the Solicitor General seems to argue that the disability determination should be conducted without regard to "the extent to which [ameliorative] medications or devices impose new limitations" on impaired individuals. U.S. Br. 15. The Solicitor General's position in this regard is perhaps understandable, because it at least has the advantage of consistency; the alternative would be to adopt an incoherent, unprincipled, and result-oriented reading of prong one, under which the relevance of ameliorative measures (or of various aspects thereof) depends on which litigant would be advantaged by their consideration. As it happens, however, the position that the Solicitor General appears to be advancing in this Court is squarely at odds with the position taken by the EEOC.

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trolled high blood pressure which does not substantially limit his work activities.") (emphasis added and deleted); 2 EEOC, Compliance Manual § 902.4(c) (1995) (to satisfy prong one, "[t]he individual's *ability to perform* the major life activity must be restricted") (emphasis added); *id.* ("Not every impairment *affects an individual's life* to the extent that it is a substantially limiting impairment.") (emphasis added); *id.* § 902.4(c)(1) ("This analysis focuses on the individual in question and analyzes whether the individual's impairment is substantially limiting *for that individual*.") (emphasis added); *id.* § 902.4(d) ("The length of time that an impairment *affects* major life activities may help to determine whether the impairment substantially limits those activities.") (emphasis added). Interestingly, the Department of Education also appears to have concluded that ameliorative measures must be considered in making the "disability" determination. *See* 61 Fed. Reg. 28436, 28440 (1996) (finding that 4.3 million Americans are "unable to see to read ordinary newspaper print *even when wearing glasses*" but that only 1.3 million Americans suffer from "a visual impairment that substantially limits one or more major life activity").

The EEOC has repeatedly opined that ameliorative measures taken by an individual to control his or her impairment *must* be considered as part of the disability determination—but only to the extent they assist the impaired individual in proving disability. Thus, the EEOC takes the position that "[i]f medications cause negative side effects, these side effects *should be considered* in assessing whether the individual is substantially limited" (EEOC Enforcement Guidance: The ADA and Psychiatric Disabilities, 2 Empl. Prac. Guide (CCH) ¶ 5430 at 6147 n.24 (Mar. 25, 1997) (emphasis added))—without offering any attempt to harmonize that conclusion with the diametrically opposed statement that "[w]hether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication." *Id.* at 6148. Similarly, the EEOC has stated that "an impairment that requires radiation therapy, which results in an abnormal rate or degree of exhaustion," renders the impaired individual disabled. EEOC Compliance Manual, § 902.4(c)(3), Ex. 3. *See also Mount v. Widnall*, No. WL 01923213, 1994 WL 739760 *2 (EEOC May 26, 1994) (individual was disabled because his "[impairment] *and his continual medication* caused some psychomotor slowing").

For all these reasons, the EEOC's position as reflected in the interpretive guidance and related materials lacks even the "power to persuade," and thus is entitled to no weight. *See, e.g.*, *Sutton*, 130 F.3d at 901-02; *Gilday v. Mecosta County*, 124 F.3d 760, 766-67, 768 (6th Cir. 1997) (concurring and dissenting opinions of Kennedy, J., and Guy, J.).[22] Indeed, even if the guidance were entitled to *Chevron* deference—which it plainly is not—it would not be controlling here, because the EEOC's interpretation is simply not "reasonable." *NCUA v. First National Bank & Trust Co.*, 118 S. Ct. 927, 938 (1998). And of course, there is no need to consider the EEOC's reading of the ADA at all, because the statutory

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[22] For the same reasons, the Department of Justice's interpretive guidances on this issue are equally lacking in persuasive value.

definition yields only one answer to the question presented in this case.[23]

II. PETITIONER WAS NOT "REGARDED AS" DISABLED

The third prong of the definition of disability provides that an individual is disabled if he or she is "regarded as" having an impairment that substantially limits one or more major life activities, even though the individual does not in fact suffer from such an impairment. 42 U.S.C. § 12102(2)(C). Petitioner contends that he is disabled under prong three, because UPS allegedly "regarded" him as substantially limited in the major life activity of working. Pet. Br. 35-38.

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23 Petitioner argues in the alternative (Pet. Br. 30-32) that he is disabled even when his condition is evaluated in its real-world state. That issue is not properly before this Court, and should not be considered. The first question presented in the petition asks only "[w]hether the ADA . . . requires that Mr. Murphy's hypertension be evaluated in its unmedicated state" (Pet. i; *see also* Pet. 7); that question does not fairly encompass an inquiry into whether the court of appeals erred in its evaluation of petitioner's *medicated* impairment. SUP. CT. R. 14.1(a). In any event, both courts below examined the record evidence and concluded that there was no genuine issue of material fact on this issue. Pet. App. 4a, 29a-32a. That fact-bound determination is plainly correct: Petitioner has worked as a mechanic for 22 years without experiencing any significant limitations; his hypertension has no effect on his daily activities in that he "functions normally, doing everyday activity that an everyday person does"; and his only hypertension-related physical restriction is that he should not repetitively lift 200 pounds or more. Pet. App. 4a, 13a; J.A. 52a, 63a, 66a, 108a. The possibility that petitioner *might* suffer unpleasant side effects *if* he attempted to lower his blood pressure below 160/90 (Pet. Br. 31) is simply beside the point.

A. Petitioner Was Not "Regarded As" Substantially Limited In The Major Life Activity Of Working

Petitioner claims (Pet. Br. 35) that he was "regarded as" disabled because UPS considered him "unfit to work precisely because of his high blood pressure." Petitioner's argument in this regard mischaracterizes the record and finds no support in the law.

The record evidence clearly shows that UPS discharged petitioner solely because his blood pressure exceeded DOT limits. Both the district court and the court of appeals so held (Pet. App. 5a, 32a), and the record evidence amply confirms that holding. J.A. 85a-88a, 103a-105a. Indeed, the UPS employee who made the decision to terminate petitioner's employment testified without contradiction that petitioner was fired because he "did not meet the requirements of the Department of Transportation." J.A. 103a.[24] Thus, there is no evidence that UPS viewed petitioner as "unfit to work" in general. Rather, the evidence shows only that UPS regarded petitioner as unqualified to work *as a UPS mechanic* because he did not have a valid DOT health card. J.A. 105a, 120a.

An employer's mere recognition that an employee is *impaired*—such as by having high blood pressure—is insufficient to support a finding that the employee is "regarded as" disabled, even if the impairment renders the employee unable to qualify for the particular job in question. Prong three encompasses only those individuals who are "regarded as hav-

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24 Petitioner points to testimony to the effect that he was discharged because of his high blood pressure (Pet. Br. 35 n.16), but he does not contend that UPS discharged him for any reason other than the fact that his blood pressure exceeded DOT standards. Indeed, petitioner himself admitted that his blood pressure exceeded DOT requirements (J.A. 48a-49a; C.A. App. 108); for that very reason, he initially sought a waiver of those requirements (J.A. 49a, 54a; C.A. App. 109).

ing *such* an impairment," *i.e.*, an impairment "that substantially limits" a major life activity. 42 U.S.C. § 12102(2)(A) & (C) (emphasis added). In order to satisfy prong three, therefore, petitioner was required to prove that UPS "regarded" him as substantially limited in a major life activity. *See, e.g., Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 912-13 (11th Cir. 1996) (citing cases), *cert. denied*, 118 S. Ct. 630 (1997).

Contrary to petitioner's *ipse dixit* (Pet. Br. 35 & n.17), the inability to obtain a DOT health card does not constitute a substantial limitation on petitioner's major life activity of working. "Other than his position at UPS, [petitioner] has never been required to obtain DOT certification for any other job." Pet. App. 16a. He has "performed mechanic jobs that did not require DOT certification" for "over 22 years," and he secured another job as a mechanic shortly after leaving UPS. *Id.* at 13a, 17a. Plainly, petitioner has suffered no substantial limitations in working, and UPS perceived none.

The expert testimony in the record confirms that petitioner's failure to qualify for a valid DOT health card does not "substantially limit[]" his ability to work. UPS's vocational expert concluded that petitioner's hypertension does not generally "limit his ability to work or obtain jobs in the open labor market." J.A. 112a. Petitioner did not refute this evidence or prove that UPS had a different perception. The record is clear that UPS did not regard petitioner as substantially limited in the major life activity of working; rather, UPS regarded him only as incapable of working as a UPS mechanic because he lacked a valid DOT health card.

Cases construing the "regarded as" provision of the Rehabilitation Act prior to adoption of the ADA compel rejection of petitioner's "regarded as" claim. Those cases uniformly hold that an individual's inability to satisfy a prerequisite for a particular job is not a "substantial" limitation. *See, e.g., Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) ("regarded as" prong not satisfied by proof that employer viewed employee as "'incapable of satisfying the singular demands of a particular job'") (quoting *Forrisi v. Bowen*, 794

F.2d 931, 934 (4th Cir. 1986)). As the court explained in *de la Torres v. Bolger*, 610 F. Supp. 593, 596-97 (N.D. Tex. 1985), *aff'd on other grounds*, 781 F.2d 1134 (5th Cir. 1986) "[a]n impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not 'substantially limit[ing]' for purposes of the Rehabilitation Act." *Accord, e.g., Forrisi*, 794 F.2d at 935 (test is whether the employer finds "the employee's impairment to foreclose generally the type of employment involved"); *Miller v. AT&T Network Sys.*, 722 F. Supp. 633, 639 (D. Or. 1989) ("the impairment must substantially limit an individual's employability generally, and not just with respect to one particular job"), *aff'd and adopted*, 915 F.2d 1404 (9th Cir. 1990).[25]

Thus, the pre-ADA Rehabilitation Act cases make clear that an employer's blanket exclusion of an impaired individual from a specific job is insufficient to render the individual disabled under the "regarded as" prong. In *Daley v. Koch*, for example, the Second Circuit held that "[b]eing declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity." 892 F.2d at 215. *Accord, e.g., McLeod v. City of Detroit*, 1985 U.S. Dist. LEXIS 16613 at *9 (E.D. Mich. 1985) (rejecting notion that "being a firefighter [i]s a major life activity"). *A fortiori*, there is no possible basis for finding that petitioner was "regarded as" disabled, because UPS did not even regard him as incapable of working as a mechanic; instead, UPS merely regarded him as lacking a valid DOT health card and therefore barred from working as a mechanic for UPS.

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25 The case law under the ADA is the same. *See, e.g., Patterson v. Chicago Ass'n For Retarded Citizens*, 150 F.3d 719, 725 (7th Cir. 1998) (the "'impairment must substantially limit employment generally'"); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir. 1997) (the impairment must "'foreclose generally the type of employment involved'"); *Gordon*, 100 F.3d at 913.

Petitioner points to the EEOC's regulation addressing the "regarded as" prong, which provides:

> The term *substantially limits* means significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). Petitioner claims (without explanation or analysis) that his inability to obtain a DOT health card "implicates" either a class or a broad range of jobs. Pet. Br. 35 n.17.

The EEOC's regulation is of no assistance to petitioner. The regulation defines "class of jobs" to mean all "jobs utilizing similar training, knowledge, skills or abilities" as the job at issue within the geographic area to which the individual has reasonable access. 29 C.F.R. § 1630.2(j)(3)(ii)(B). Petitioner points to no evidence that UPS regarded him as precluded from working in all (or even most) such jobs in his geographic area, and his 22-year work history is directly inconsistent with any such assertion.[26]

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26 Petitioner correctly notes (Pet. Br. 35 n.17) that a DOT health card is required for all employees driving "commercial motor vehicles" in "interstate commerce." 49 C.F.R. § 390.3(a). That fact does not demonstrate that petitioner was, or was regarded as, excluded from a "class of jobs," however. There is no evidence that the ability to drive commercial vehicles in interstate commerce is a prerequisite for all or most jobs requiring "training, knowledge, skills or abilities" similar to those required for a UPS mechanic's job. In fact, the record evidence is squarely to the contrary, as petitioner's ease in obtaining employment amply demonstrates. Indeed, even if petitioner were a truck driver, rather than a mechanic, his inability to obtain a DOT health card would not exclude him from a "class of jobs"; the DOT's requirements generally extend only to large vehicles (those weighing over 10,000 pounds) and do

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The regulation defines a "broad range of jobs in various classes" as "other jobs not utilizing similar training, knowledge, skills or abilities." 29 C.F.R. § 1630.2(j)(3)(ii)(C). Once again, petitioner points to nothing in the record demonstrating that he was regarded as incapable of performing a "broad range of jobs," and UPS's expert concluded without contradiction that he is in fact capable of performing *thousands* of jobs. J.A. 114a.

Federal courts applying the EEOC's regulations have uniformly rejected claims like those advanced by petitioner. In *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998), for example, the court rejected an ADA claim brought by a terminated pilot, holding that "piloting airplanes is too narrow a range of jobs to constitute a 'class of jobs.'" *Id.* at 1370. Similarly, in *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997), the Fifth Circuit concluded that "[a] limitation that prevents one from becoming a firefighter—or even a firefighter and associated municipal paramedic or EMT backup firefighter . . . only affects a 'narrow range of jobs'" and implicates "too narrow a field to describe [as] a 'class of jobs.'" *Id.* at 334, 336.[27]

Against this backdrop, petitioner's "regarded as" claim is patently meritless. Petitioner could no doubt have obtained any number of mechanic and other jobs in his region, and there is no indication that UPS perceived him as unable to do so. Nor is there any evidence that respondent was "regarded as" unable to perform other driving-related jobs not requiring

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not cover trucks or large other vehicles traveling in intrastate commerce. 49 C.F.R. § 390.5. *A fortiori*, then, a mechanic like petitioner is not (and is not perceived as) substantially limited in working merely because he cannot obtain a DOT health card.

27 *Accord, e.g.*, *Patterson*, 150 F.3d at 725; *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *McKay*, 110 F.3d at 373; *Welsh*, 977 F.2d at 1416-20.

compliance with DOT standards. Petitioner's "regarded as" claim must fail.

B. The Court Of Appeals Correctly Held That Petitioner Failed To Satisfy DOT Requirements

Petitioner contends (Pet. 36-37) that the court of appeals erred in holding that he failed to satisfy DOT requirements.[28] Even if that contention were correct, it would be irrelevant, because the record is clear that UPS did not regard petitioner as substantially limited in his ability to work. In any event, petitioner's contention is incorrect.

The DOT's regulations provide that an individual cannot drive a "commercial motor vehicle" if he or she has "high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. § 391.41(b)(6). The DOT has provided further guidance on this issue in its Medical Regulatory Criteria for Evaluation Under Section 391.41(b)(6), which states that where an individual's "[i]nitial blood pressure [is] greater than 180 systolic and/or greater than 104 diastolic," "*[t]he driver may not be qualified, even temporarily*, until his or her blood pressure has been reduced to less than 181/105." J.A. 99a (emphasis in original); *see* C.A. App. 85 (same); EEOC C.A. Br. 4 (conceding that "[i]f the person's blood pressure is greater than 180/104, . . . the person is not to be certified as qualified, even temporarily, until his blood pressure has been reduced to less than 181/105").

Petitioner's initial blood pressure reading was 186/124, well in excess of the upper limit established by the DOT criteria. Pet. App. 16a. Although he was issued a DOT health card at that time, it is clear that the health card was invalid and was issued in error, based on the examining nurse's incorrect assumption that petitioner, as a mechanic, would not be driving commercial vehicles. *Id.*; J.A. 74a-75a, 84a, 93a, 106a-107a.

Petitioner notes (Pet. Br. 37) that his blood pressure was lower than 181/105 when it was retested in September 1994, and both he and the Solicitor General argue that the DOT's regulations grant medical examiners discretion to grant temporary three-month certificates in those circumstances. But there is no evidence that the individual who performed the second examination in fact decided to exercise this alleged discretion to issue a temporary health card. To the contrary, the only evidence on that issue is the testimony of UPS's medical expert, who concluded that petitioner was not qualified for discretionary issuance of a temporary health card. J.A. 109a-111a.

Thus, petitioner never received a valid DOT health card and failed to satisfy DOT requirements for drivers of commercial vehicles. DOT regulations permit individual employees or applicants to seek administrative relief in such circumstances (49 C.F.R. § 391.47), but petitioner ultimately chose not to pursue such relief. J.A. 49a-50a, 54a. His failure to exhaust administrative remedies precludes judicial review of this issue.

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[28] Petitioner waived this issue in the district court, where he admitted that under the DOT medical criteria "in order to be physically qualified to drive a commercial motor vehicle, other than a temporary three-month certification, . . . an individual must maintain blood pressure less than or equal to 160/90." J.A. 127a-128a ¶ 30; J.A. 136a. Nor is this issue fairly encompassed within the grant of certiorari. Petitioner's fourth question asks "[w]hether there was no genuine dispute whether UPS regarded [petitioner] as disabled and fired him because of his hypertension?" Pet. i. The petition's one-paragraph discussion of that question (Pet. 7-8) contains no suggestion that it encompasses a challenge to the correctness of the court of appeals' determination that petitioner's "blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." Pet. App. 5a. Indeed, the only sentence in the petition that even arguably relates to such an assertion is contained in the discussion of the second question presented—a question on which the Court did not grant certiorari. *See* Pet. 7.

The Solicitor General argues at length (U.S. Br. 25-29) that it was error for the court of appeals to give any weight to petitioner's failure to satisfy DOT guidelines. That argument misses the point. In the court of appeals, both petitioner and the EEOC argued that petitioner was "regarded as" disabled because UPS purportedly "'made an employment decision because of a perception of disability based on "myth, fear or stereotype."'" EEOC C.A. Br. 15; *see* Pet. App. 4a-5a. In noting that UPS's employment action was instead based on petitioner's failure to satisfy DOT requirements, the court of appeals was simply responding to the arguments advanced by petitioner and the EEOC.

In any event, while an applicant's failure to meet arbitrary employer-established job qualifications would not preclude a showing that the employer "regarded" the applicant as disabled, it hardly follows that the legitimacy of an employer's reasons for an employment action are irrelevant to the "regarded as" inquiry. This Court held in *Arline* that the "regarded as" prong was intended to protect against "discrimination on the basis of mythology." 480 U.S. at 284. UPS's reasonable reliance on DOT guidelines confirms that petitioner was not "regarded as" disabled, because UPS acted on the basis of "reasoned and medically sound judgments" rather than engaging in "reflexive reactions" to a "perceived" disability. *Id.* at 284-85.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

TITLE 42–THE PUBLIC HEALTH AND WELFARE

CHAPTER 126–EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

* * * * *

§ 12101. **Findings and purpose**

(a) **Findings**

The Congress finds that–

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

* * * * *

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

* * * * *

(b) **Purpose**

It is the purpose of this chapter–

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

* * * * *

§ 12102. **Definitions**

As used in this chapter:

(1) **Auxiliary aids and services**

The term "auxiliary aids and services" includes–

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) **Disability**

The term "disability" means, with respect to an individual–

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * * *

SUBCHAPTER I—EMPLOYMENT

* * * * *

§ 12111. **Definitions**

As used in this subchapter:

* * * * *

(9) **Reasonable Accommodation**

The term "reasonable accommodation" may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * * * *

§ 12112. **Discrimination**

(a) **General Rule**

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction**

As used in subsection (a) of this section, the term "discriminate" includes–

* * * * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such governed entity;

* * * * *

(d) **Medical examinations and inquiries**

* * * * *

(3) **Employment entrance examination**

* * * * *

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

* * * * *

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;

* * * * *

SUBCHAPTER II—PUBLIC SERVICES

PART A—PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

* * * * *

§ 12132. **Discriminations**

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

* * * * *

§ 12134. **Regulations**

(a) **In general**

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary

of Transportation under section 12143, 12149, or 12164 of this title.

* * * * *

PART B—ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

SUBPART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS

* * * * *

§ 12142. **Public entities operating fixed route systems**

* * * * *

(c) **Remanufactured vehicles**

* * * * *

(2) Exception for historic vehicles

(A) **General rule**

If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

* * * * *

§ 12143. **Paratransit as a complement to fixed route service**

* * * * *

(b) **Issuance of regulations**

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

* * * * *

§ 12147. **Alterations of existing facilities**

(a) **General rule**

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination * * * for a public entity to fail to make such alterations * * * in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities * * *.

* * * * *

§ 12149. **Regulations**

(a) **In general**

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

* * * * *

SUBPART II—PUBLIC TRANSPORTATION BY INTERCITY AND COMMUTER RAIL

* * * * *

§ 12164. **Regulations**

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

* * * * *

SUBCHAPTER III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

* * * * *

§ 12182. **Prohibition of discrimination by public accommodations**

(a) **General rule**

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) **Construction**

* * * * *

(2) **Specific prohibitions**

(A) **Discrimination**

For purposes of subsection (a) of this section, discrimination includes—

* * * * *

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation

barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

* * * * *

§ 12183. **New construction and alterations in public accommodations and commercial facilities**

(a) **Application of term**

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

* * * * *

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. * * *.

* * * * *

§ 12184. **Prohibition of discrimination in specified public transportation services provided by private entities.**

(a) **General rule**

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

* * * * *

(c) **Historical or antiquated cars**

(1) **Exception**

To the extent that compliance with subsection (b)(2)(C) or (b)(7) of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, * * * such compliance shall not be required.

* * * * *

§ 12186. **Regulations**

(a) **Transportation provisions**

(1) **General rule**

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

(2) **Special rules for providing access to over-the-road buses**

(A) **Interim requirements**

(i) **Issuance**

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regula-

tions in an accessible format to carry out sections 12184(b)(4) and 12812(b)(2)(D)(ii) of this title * * *.

* * * * *

(B) **Final requirement**

* * * * *

(ii) **Issuance**

Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title * * *.

* * * * *

(b) **Other provisions**

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

* * * * *

§ 12202. **State immunity**

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

* * * * *

§ 12204. **Regulations by architectural and transportation barriers compliance board**

(a) **Issuance of guidelines**

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and II of this chapter.

(b) **Contents of guidelines**

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

* * * * *